In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 1099

JOSEPH DIPPOLITO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

After a jury trial in the United States District Court for the Central District of California, petitioner was convicted on two counts of perjury before a federal grand jury, in violation of 18 U.S.C. 1621. He was sentenced to consecutive prison terms of five years. The court of appeals affirmed (Pet. App. A).

The sole contention here is that he was entitled to have his attorney present with him inside the grand jury room notwithstanding the contrary provisions of Rule 6(d), F.R.Crim.P. This contention was not made to or considered by the court below. It is admitted that petitioner's counsel was present to assist him outside the grand jury room and that petitioner was

414-434—71

advised of his rights not to testify or incriminate himself, as well as of the penalties for perjury.

Petitioner's proposition has never been accepted by this or any other federal appellate court. See *Hannah* v. *Larche*, 363 U.S. 420, 497–499 (Douglas, J. dissenting); *United States* v. *Levinson*, 405 F. 2d 971, 979–980 (C.A. 6), certiorari denied *sub nom. Strang* v. *United States*, 395 U.S. 906. An appearance before a grand jury cannot, as petitioner urges, be deemed equivalent to custodial interrogation to which the decision in *Escobedo* v. *Illinois*, 378 U.S. 478, was directed.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

JANUARY 1971.

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